

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Sudeen G. Kelly.

ConocoPhillips Transportation Alaska, Inc.

Docket No. OR05-8-000

ORDER ON COMPLAINT

(Issued August 23, 2005)

1. On May 31, 2005, ConocoPhillips Transportation Alaska, Inc. (ConocoPhillips) filed FERC Tariff No. 7 to cancel FERC Tariff No. 6. FERC Tariff No. 7, which became effective July 1, 2005, as requested, applies to movements on ConocoPhillips' capacity in the Trans Alaska Pipeline System (TAPS) and contains the following revisions to the rules and regulations of ConocoPhillips' tariff:

- (a) gravity adjustment revised from \$0.0282 to \$0.0330;
- (b) two classes of interstate shippers established ("Regular Shipper" and "New Shipper");
- (c) application of the reservation fee clarified; and
- (d) wording throughout the rules and regulations changed to conform to defined terms.

2. On June 29, 2005, BP Exploration (Alaska) Inc. and BP Oil Supply Company (jointly, BP) filed a Motion to Intervene, Protest, and Request for Rejection or Suspension, and Request for Acceptance of Late Filed Protest or, in the Alternative, Complaint Requesting Fast Track Processing and Request for Reparations (complaint). BP protested the filing, asserting that, because of inadequate notice, it did not become aware of the significance of the proposed changes until after the established protest period. In the alternative, BP asked the Commission to treat its protest as a complaint against FERC Tariff No. 7.

3. As discussed below, the Commission views BP's June 29, 2005 filing as a complaint. By notice issued July 20, 2005, in accordance with a joint motion by the parties, the Commission established August 1, 2005, as the deadline for filing comments,

interventions, and ConocoPhillips' answer. For the reasons given below, the Commission denies the complaint because BP has failed to demonstrate that it has been injured.

BP's Protest/Complaint

4. BP states that it is a shipper on the ConocoPhillips pipeline system and that it has a substantial economic interest in this proceeding. BP asserts that the revised proration policy in FERC Tariff No. 7 violates the Interstate Commerce Act (ICA) because it is unjust, unreasonable, and creates an undue and unreasonable preference or advantage for ConocoPhillips. In the alternative, BP requests that the Commission treat its filing as a complaint against the revised proration policy pursuant to ICA section 13(1). Additionally, if the revised proration policy is implemented and has an adverse effect, BP requests that the Commission award BP reparations for any damages it may suffer during the period when the new proration policy is in effect.

5. BP states that FERC Tariff No. 7 creates two classes of interstate shippers: Regular Shippers and New Shippers. According to BP, the revised tariff grants Regular Shippers a preference over New Shippers because, during any months when shipper nominations exceed the interstate capacity of the system, Regular Shippers will have a preferential access to 95 percent of that capacity, while limiting New Shippers to the remaining five percent.

6. BP further contends that FERC Tariff No. 7 creates preferences each month among Regular Shippers based on their historical usage of the system. Specifically, BP maintains that, in months when Regular Shipper nominations exceed the capacity allocated to Regular Shippers, ConocoPhillips will allocate the available capacity among those shippers based on their average volumes shipped during the "Rolling Period." In other words, continues BP, ConocoPhillips no longer will allocate capacity to Regular Shippers based on their nominations during a month, but instead, shippers that have shipped a higher average volume over a preceding period will have a preference in the capacity allocation. In contrast, maintains BP, it has been customary on the TAPS system to allow shippers to change carriers without any penalty based on the shippers previously transported volumes.

7. BP also argues that the Commission should reject the revised proration policy because it had significantly affected shippers beginning before May 31, 2005, when ConocoPhillips filed FERC Tariff No. 7. BP explains that, under ConocoPhillips' rules and regulations, shippers must submit nominations on the third working day of the month prior to the month of shipment. In this case, continues BP, under FERC Tariff No. 7, volumes shipped on ConocoPhillips' system during July 2005 play a critical role. BP explains that the status of being a Regular Shipper and entitled to certain preferences turns on whether and the extent to which a shipper nominates and ships volumes on

ConocoPhillips during the Rolling Period. BP states that the revised policy defines the Rolling Period as the 12-month period beginning 14 months prior to the month requiring proration. BP also states that this definition only applies beginning 14 months after FERC Tariff No. 7 becomes effective.

8. BP claims that deficiencies in the notice made it difficult to understand the significance of FERC Tariff No. 7. In fact, continues BP, even if shippers had been aware of the proposed change when ConocoPhillips made the filing, they would have had three working days (from May 31 to June 3) to consider actions necessary to implement the revised tariff provisions.

9. BP states that it does not believe that the issues present in this proceeding are pending in another Commission proceeding or in any other forum in which BP is a party. BP also seeks reparations for any financial damages it may suffer as a result of ConocoPhillips' revised proration policy, as well as a stay of the effective date, or if the tariff has become effective, a stay of the further effectiveness of the policy, pending a determination of the lawfulness of the revised policy. BP states that it did not seek other means to resolve this dispute because of the lack of time; however, BP believes that alternative dispute resolution or mediation under the Commission's auspices might resolve the dispute. BP seeks Fast Track Procedures.

Notice and Answer

10. Public notice of the complaint was issued on July 20, 2005, granting the parties' motion to extend the deadline for answers and comments to August 1, 2005. The notice also stated that the parties had commenced settlement negotiations. ConocoPhillips filed its answer on August 1, 2005. No other person filed comments, protested, or intervened in the proceeding.

11. In its answer, ConocoPhillips explained that, although TAPS is a single pipeline operated by a single operator, each of the TAPS carriers publishes its own tariffs and offers service directly to shippers through its undivided joint interest in the total TAPS capacity. According to ConocoPhillips, the interstate tariff rates of the carriers vary considerably, and while shippers can choose among the carriers, an individual carrier is limited to transporting volumes that amount to no more than its proportionate share of the total system capacity.

12. ConocoPhillips explains that it has used a straight *pro rata* approach to prorationing its capacity based on the ratio of each shipper's current nomination to the total of all nominations. However, ConocoPhillips observes that the total capacity of TAPS will likely exceed the total amount of crude oil production that must be shipped in

the foreseeable future, so shippers can expect that TAPS will accommodate all volumes, will be handled, although shippers may be unable to ship on any particular carrier's space.

13. ConocoPhillips states that the *pro rata* method may expose it to certain practical and financial risks and burdens. For example, explains ConocoPhillips, a shipper could ship on one carrier one month, on another carrier the next month, and then split its volumes among carriers in other months. Thus, continues ConocoPhillips, shippers could over-subscribe the ConocoPhillips capacity in some months and under-subscribe it in other months.

14. ConocoPhillips first cites a potential problem relating to the massive linefill requirement of the TAPS system. ConocoPhillips states that it requires each shipper to provide its share of the system base inventory. While shippers have tended to nominate to particular carriers in predictable and consistent patterns in the past, ConocoPhillips states that greater shifting of volumes into and out of its capacity has occurred. As a result, ConocoPhillips explains that it must return the system base inventory of certain shippers and at the same time obtain replacement volumes from other shippers. Moreover, continues ConocoPhillips, delays in this process can create substantial logistical and administrative problems. ConocoPhillips states that another possible risk is that it will find itself left with unused capacity as a result of shippers changing carriers from month to month. In fact, states ConocoPhillips, this situation has occurred numerous times in recent months.

15. ConocoPhillips states that these factors prompted it to adopt a well-established alternative to the *pro rata* method of prorationing its TAPS capacity. According to ConocoPhillips, pipelines in the lower 48 states have used prorationing procedures based on historical usage, which rewards shippers for their loyalty by protecting their historic usage patterns when the line is in proration due to increased demand. At the same time, explains ConocoPhillips, this procedure protects the pipeline by encouraging consistent nominations and giving shippers incentives to stay on the line during periods of reduced demand.

16. ConocoPhillips states that FERC Tariff No. 7 is generally consistent with these historically-based proration policies. ConocoPhillips explains that under the revised tariff, Regular Shippers will build up an entitlement to space in the pipeline based on their average historical usage over a 12-month Rolling Base period. According to ConocoPhillips, in periods of proration, it will determine a Regular Shipper's apportioned space on the basis of its average historical volume or its actual nomination, whichever is lower.

17. However, continues ConocoPhillips, to ensure that new shippers have an adequate opportunity to obtain service and establish historical usage patterns, it will reserve a

percentage of its capacity for New Shippers, even when Regular Shippers are already subject to prorationing. ConocoPhillips explains that New Shippers are guaranteed no less than five percent of the available capacity in any month or more if additional capacity is available.

18. ConocoPhillips emphasizes that it is aware of the transition issues involved in going from a purely *pro rata* policy to a historical policy so it chose to implement the new policy on a gradual basis. According to ConocoPhillips, for the first six-month period (July 1, 2005 – December 31, 2005), all shippers will be considered Regular Shippers, and all prorationing will continue on a purely *pro rata* basis, *i.e.*, in proportion to current nominations. ConocoPhillips further states that all potential shippers have an equal opportunity to nominate for a share of its capacity (currently the space with the lowest interstate tariff rate) during that period. However, ConocoPhillips explains that, beginning January 1, 2006, it will apportion space based on average historical usage from July 1, 2005 forward. Then, continues ConocoPhillips, when it has the data to determine usage during the first 12 months, the base period will become a rolling 12-month period beginning 14 months prior to the month in which prorationing occurs.¹

19. ConocoPhillips maintains that it notified its shippers of proposed FERC Tariff No. 7 using the same electronic method of notification it has used -- without objection -- since at least 2002. Further, states ConocoPhillips, because the tariff became effective without suspension or investigation, BP's procedural claim is moot. ConocoPhillips emphasizes that it could have waited until December 1, 2005, to give notice of the change in policy, but that it filed its tariff early to give its shippers the opportunity to adjust their nominations during the initial six-month base period.

20. With respect to the substantive issues raised by BP, ConocoPhillips responds that Commission precedent and longstanding industry practice support the validity of its historically-based proration policy. ConocoPhillips states that, while common carrier oil

¹ ConocoPhillips states that the historic proration policy in FERC Tariff No. 7 applies only to interstate transportation. Intrastate transportation is subject to a different system approved by the intrastate regulator in the early years of TAPS operations. Order No. 26, *Amerada Hess Pipeline Corp.*, 1 APUC 606, 613-14 (1980). Essentially, explains ConocoPhillips, each TAPS Carrier is permitted to limit its transportation of intrastate barrels to its ownership percentage in the system. ConocoPhillips states that it first allocates space to intrastate barrels in accordance with that rule and then prorates the remaining space among the interstate shippers under its interstate proration policy.

pipelines are required to maintain equitable, non-discriminatory proration policies,² the Commission has held that “[t]here is no single method of allocating capacity in times of excess demand on oil pipelines and pipelines should have some latitude in crafting capacity allocation methods to meet circumstances specific to their operations.”³ In particular, continues ConocoPhillips, the Commission has acknowledged that “[c]apacity allocation, if and when needed, based on historical volumes ... is a rational method of [prorating]” and that any resulting “less favorable capacity entitlement” for a particular shipper “is the result of [the shipper’s] own decision to ship or not ship....”⁴

21. ConocoPhillips cites other proceedings in which the Commission has found historical proration policy acceptable. For example, ConocoPhillips cites *Explorer Pipeline Co.*,⁵ where the Commission stated that “Explorer uses an historical-based proration methodology, under which access to the pipeline falls to shippers with movements made over the entire year period versus shippers that choose to ship only during peak periods.” ConocoPhillips also cites *SFPP, L.P.*,⁶ where the Commission acknowledged that the pipeline’s proration policy “allocate[d] capacity among shippers in times of constraint in proportion to their prior twelve-month average.” ConocoPhillips emphasizes that, while the Commission disallowed certain aspects of the pipeline’s policy that were grounded in “demonstrated need” for additional access, it did not take issue with the policy’s basic preference for shippers based on past movements. Additionally, ConocoPhillips cites *Total Petroleum, Inc. v. Citgo Products Pipeline*,⁷ where the Commission rejected a complaint against a proration policy that allocated capacity based on movements during the 12 months prior to nomination except insofar as the complaint alleged discriminatory applications of the policy. Finally, ConocoPhillips

² ConocoPhillips cites *Belle Fourche Pipeline Co.*, 28 FERC ¶ 61,150 at 61,282 (1984) (“[A] provision which allows a pipeline to transport the tender of one shipper in its entirety while refusing to transport any of the oil tendered by another shipper would seem to be unlawful on its face.”).

³ ConocoPhillips cites *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094 at 61,336 (2004).

⁴ *Id.*

⁵ 87 FERC ¶ 61,394 at 62,387 n.14 (1999).

⁶ 86 FERC ¶ 61,022 at 61,115 (1999).

⁷ 76 FERC ¶ 61,164 at 61,947 (1996). ConocoPhillips points out that BP has not alleged discriminatory application of the new proration policy and that it could not do so because the policy has not yet gone into effect.

states that historical proration policies have not been limited to stand-alone pipelines, but have been used by competing undivided joint interest owners in single systems that are similar to the arrangements of the TAPS carriers.

22. ConocoPhillips observes that BP argues in favor of ConocoPhillips' previous practice of allocating capacity based on current nominations, but ConocoPhillips contends that current circumstances may warrant changes in policies, as is the case here. ConocoPhillips emphasizes that no shipper is entitled to a continuation of its proration policy, especially in light of the Commission's statement that pipelines should have some latitude in crafting capacity allocation methods to meet circumstances on their systems, as ConocoPhillips has done here.

23. ConocoPhillips rejects BP's contention that the Commission should view the revised proration policy as anti-competitive because it may result in higher transportation costs for shippers. ConocoPhillips emphasizes that its interstate rates are the lowest on the TAPS System, so that to the extent BP seeks to move to other carriers, it attribute that action to the desire for lower-priced transportation. Further, states ConocoPhillips, even if it charged a higher rate than other carriers at some later time, it is not anti-competitive to encourage shippers to continue using its space. ConocoPhillips emphasizes that shipper loyalty is a positive attribute of historically-based proration policies, but that TAPS shippers have the right to determine when the short-term economic benefits of shifting volumes to another carrier might benefit them.

24. Finally, ConocoPhillips states that BP incorrectly asserts that the new policy will foreclose BP's shipped volumes from the ConocoPhillips system over the period of time when the rule is in effect. ConocoPhillips points out that all shippers have six months from July through December 2005 to build up a history as Regular Shippers before the historical prorationing rules begin to operate. ConocoPhillips also emphasizes that shippers can continue to ship on its system in some months and not in others, but still can establish their entitlements. Because the historical base period is a rolling period, ConocoPhillips emphasizes that BP will have the opportunity to establish or increase its historical entitlement by nominating more oil for movement on ConocoPhillips' capacity.

25. ConocoPhillips also states that, even if BP moves no oil through its system during the July – December period, it can always nominate as a New Shipper at any time and have an opportunity to obtain a share of the five percent of ConocoPhillips' capacity that is expressly set aside for New Shippers.

Discussion

26. The Commission denies BP's complaint because BP has failed to demonstrate that it has been injured by application of the new proration policy.

27. BP's claims of injury are speculative because the new prorationing policy does not become effective until January 1, 2006. Until that time, BP has the same opportunity as any other shipper to establish its entitlement to future capacity during periods of prorationing. As discussed below, BP's excuse for its alleged failure to understand the significance of the filing is dubious at best. Therefore, BP can only fault itself if it failed to nominate appropriate volumes for July 2005. If it chooses to do so, BP can nominate higher volumes in the remaining months. Because ConocoPhillips' interstate rates are the lowest of the TAPS carriers, BP cannot claim financial injury if it elects this course of action.

28. Additionally, as ConocoPhillips points out, prorationing policies based on historical volumes are an acceptable means of allocating capacity on other pipelines, and there is no evidence in this record that such a policy will be less effective for ConocoPhillips as a TAPS carrier or that BP has been or will be injured by application of the policy.

29. Although BP's protest of FERC Tariff No. 7 is moot because the tariff became effective on July 1, 2005, the Commission will address briefly the procedural issue raised by BP's protest. The Commission finds that BP failed to justify its belated filing. The pleadings show that ConocoPhillips provided notice in its normal fashion, although BP claims that it failed to comprehend the significance of the filing. In fact, ConocoPhillips points out that a BP representative called ConocoPhillips to inquire about the filing two weeks before it filed its protest. BP's status as a major energy company belies its explanation for its tardy protest.

The Commission orders:

BP's complaint is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.